

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO
CASE NO. OS 2008-0014**

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY BRADLEY RICHARDS
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
VOTE NO 5A.**

On May 8, 2008, Complainant Bradley Richards (Richards) filed a complaint with the Colorado Secretary of State alleging violations of the Fair Campaign Practices Act, Sections 1-45-101 *et seq.*, C.R.S. (2007) (FCPA). Kathy Ann Tourney (Tourney) was originally named as the Respondent in this action. As reflected below, the Complaint was amended to reflect the issue committee, VOTE NO 5A, as the Respondent. The Secretary of State transmitted the complaint to the Colorado Office of Administrative Courts on May 8, 2008, for the purpose of conducting a hearing pursuant to Article XXVIII, Section 9(2)(a) of the Colorado Constitution.

Hearing was held in this matter on June 2, 2008. The hearing was digitally recorded in Courtroom 1. Richards participated personally and represented himself. Tourney and VOTE NO 5A were represented by John S. Zakem, Esq., Zakem Atherton, LLC. The hearing was continued for the submission of post-hearing briefs, which were submitted on June 16, 2008. At that time, the matter was ready for the issuance of a decision. The Administrative Law Judge (ALJ) issues this Agency Decision pursuant to Colo. Const., Art. XXVIII, Section 9(2)(a) and Section 24-4-105(14)(a), C.R.S. (2007).

PRELIMINARY MATTERS

Two motions were pending at the commencement of the hearing: Tourney's Motion to Dismiss and Complainant's Motion to Amend Complaint.

Motion to Dismiss. As referenced above, the caption in this matter originally named Tourney as the Respondent. On May 23, 2008, Tourney moved to dismiss asserting that Complainant had failed to state a claim upon which relief could be granted against her either in her individual capacity or her representative capacity as registered agent for VOTE NO 5A. At the June 2, 2008 hearing, Richards conceded the motion. The ALJ granted Respondent Tourney's motion to dismiss and dismissed Tourney as a Respondent in this matter.

Motion to Amend Complaint. On May 29, 2008, Richards filed a Motion to Amend Complaint to substitute VOTE NO 5A for Tourney as the Respondent in this

matter. At hearing, Respondent did not object to this motion. Clarification of the identity of the Respondent was essential in order to proceed in an orderly fashion. In the interests of justice and in the absence of any objection, the ALJ therefore granted the Motion to Amend Complaint. The Amended Complaint thereafter governed this proceeding. Both parties also indicated that they were prepared to proceed to hearing by presenting stipulated facts, a stipulated exhibit, and submitting briefs.

ISSUE PRESENTED

The issue is whether VOTE NO 5A, an issue committee, violated Section 1-45-106(3) of the FCPA by failing properly to dispose of unexpended contributions by either donating them to a charitable organization recognized by the Internal Revenue Service (IRS) or returning them to the contributor. At issue is \$2,000 in funds that were received by VOTE NO 5A on December 17, 2007, and paid to Kathy Tourney on January 7, 2008.

FINDINGS OF FACT

1. VOTE NO 5A is an issue committee formed to oppose ballot measure 5A on the November 6, 2007 ballot.
2. 5A was defeated at the election held on November 6, 2007.
3. Kathy Tourney served as the registered agent for VOTE NO 5A.
4. VOTE NO 5A filed a Report of Contributions and Expenditures/Termination Report with the Colorado Secretary of State on January 28, 2008, reflecting contributions and expenditures for the reporting period from December 2, 2007, through January 25, 2008. As reflected in this report, there was a zero balance of funds on hand at the beginning of this period and at the end of this reporting period.
5. As reflected in the report and stipulated by the parties, PSCC, Inc., made a \$2,000 contribution to VOTE NO 5A on December 17, 2007. This was the date on which the contribution was accepted. There was no balance of funds on hand by VOTE NO 5A from December 2, 2007, until December 17, 2007.
6. As reflected in the report and stipulated by the parties, VOTE NO 5A made an expenditure of \$2,000 to Kathy Tourney for consulting on January 7, 2008.
7. Kathy Tourney is not an IRS recognized charitable organization.
8. The record contains no information regarding whether VOTE NO 5A had any funds on hand as of the date of the election, November 6, 2007.

DISCUSSION

Article XXVIII of the Colorado Constitution was adopted as an initiated measure by the voters of Colorado in 2002. The FCPA contains other provisions of Colorado's campaign finance law. In addition, the Secretary of State has adopted rules to implement these provisions. 8 CCR 1505-6. Richards contends that VOTE NO 5A violated Colorado's campaign finance law, specifically Section 1-45-106(3), C.R.S., by transferring \$2,000 of unexpended contributions to Kathy Tourney on January 7, 2008, instead of donating them to an IRS recognized charitable organization or returning them to the contributor, PSCC, Inc.

In accordance with Section 9(1)(f) and 9(2)(a) of Article XXVIII of the Colorado Constitution, this proceeding is conducted pursuant to the provisions of Section 24-4-105, C.R.S. of the State Administrative Procedure Act (APA). In such a proceeding, the proponent of the order bears the burden of proof. Section 24-4-105(7), C.R.S. In this case, Richards is the complaining party and therefore bears the burden of proof to establish a violation of Colorado's campaign finance law.

Richards asserts that the \$2,000 in funds VOTE NO 5A received from PSCC, Inc., were unexpended contributions that it was obligated to either donate to an IRS recognized charitable organization or return to PSCC. When instead the issue committee transferred the \$2,000 to Tourney on January 7, 2008, for consulting services, Richards contends that it violated Section 1-45-106(3) of the FCPA, which provides as follows:

Unexpended contributions to an issue committee may be donated to any charitable organization recognized by the Internal Revenue Service or returned to the contributor.

In addition to these provisions regarding unexpended contributions to an issue committee, the FCPA also addresses a candidate committee's obligations in relation to unexpended campaign contributions. Section 1-45-106(1), C.R.S. Colo. Const., Art. XXVIII, Section 2(15) defines "unexpended campaign contributions:"

"Unexpended campaign contributions" means the balance of funds on hand in any candidate committee at the end of an election cycle, less the amount of all unpaid monetary obligations incurred prior to the election in furtherance of such candidacy.

As the term "unexpended contributions" is undefined, the ALJ seeks guidance from the definition of "unexpended campaign contributions." In determining whether there are unexpended campaign contributions, one must first determine whether there is a balance of funds on hand at the end of an election cycle. Colo. Const., Art. XXVIII, Section 2(6) defines an election cycle as one of the following:

- (a) The period of time beginning thirty-one days following a general election for the particular office and ending thirty days following the next general election for that office;
- (b) The period of time beginning thirty-one days following a general election for the particular office and ending thirty days following the special legislative election for that office; or
- (c) The period of time beginning thirty-one days following the special legislative election for the particular office and ending thirty days following the next general election for that office.

In all cases, the election cycle ends 30 days after the election. In the case at hand, the election cycle would then end December 6, 2007. The ALJ uses this date by analogy in analyzing whether there is a balance of funds on hand and therefore whether there are unexpended funds that are subject to the provisions of Section 1-45-106(3).

As of December 6, 2007, VOTE NO 5A had no balance of funds on hand. It had a zero balance. The funds at issue here were not contributed to VOTE NO 5A until December 17, 2007, when they were accepted by the issue committee. This was 11 days after the end of the election cycle. Since there was no balance of funds on hand on December 6, 2007, the end of the election cycle, there were no unexpended funds subject to the provisions of Section 1-45-106(3). The \$2,000 contributed later by PSCC, Inc., were not unexpended funds. The issue committee was therefore not required to dispose of these funds pursuant to the provisions of Section 1-45-106(3). Richards therefore failed to establish a violation of Section 1-45-106(3) of the FCPA, and the ALJ determines that no violation of Section 1-45-106(3) has been proven.

Complainant contends that differences between issue committees and candidate committees warrant using a different date for the determination of whether there is a balance of funds on hand and thus whether there are unexpended funds. Complainant urges that for issue committees, the appropriate date should be the date of the election. He argues that the mission of an issue committee expires on the date of the election and that it is therefore appropriate to use this point in time to determine the existence of unexpended funds. The ALJ has not adopted this approach, preferring instead to adopt a uniform approach for candidate and issue committees. It is interesting to note, however, that using the date of the election in this case would lead to no different result. There is no evidence in the record to suggest that VOTE NO 5A had a balance of funds on hand on November 6, 2007. The funds at issue here, the \$2,000 contribution from PSCC, were not contributed until well after November 6.

CONCLUSIONS OF LAW

1. The ALJ has jurisdiction over this matter. Colo. Const., Art. XXVIII, Section (9)(2)(a), C.R.S. (2007).

2. Colo. Const., Art. XXVIII, Section (9)(1)(f) provides that the hearing in this matter is to be conducted in accordance with Section 24-4-105 of the APA. Under the APA, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Richards is the proponent of an order seeking a determination that VOTE NO 5A committed a violation of Section 1-45-106(c), C.R.S.

3. The evidence failed to show that VOTE NO 5A committed a violation of Section 1-45-106(c) of the FCPA. The complaint is therefore dismissed.

AGENCY DECISION

It is the Agency Decision that the complaint in this matter is dismissed. This decision is final and subject to review by the Court of Appeals, pursuant to Section 24-4-106(11), C.R.S., and the Colo. Const., Art. XXVIII, Section 9(2)(a).

DONE AND SIGNED
June 24, 2008

NANCY CONNICK
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **AGENCY DECISION** was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to:

John S. Zakhem, Esq.
Zakhem Atherton, LLC
700 17th St. Suite 2000
Denver, CO 80202

Bradley Richards
32 Willowleaf Drive
Littleton, CO 80127

and to:

William A. Hobbs
Deputy Secretary of State
Department of State
1700 Broadway, Suite 200
Denver, CO 80290

on this ____ day of _____.

Technician IV